No. 95-1318

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SHIRLEY PITTMAN, BRUCE BERNDT, RALPH CUSICK, DAVID T. PETERSON, GWENDOLYN STEELE-BUTTE, FREDERICK SEARS, individually and as class representatives,

Petitioners,

v.

THE CHICAGO BOARD OF EDUCATION, JAMES E. RYAN, Attorney General of the State of Illinois, RICHARD M. DALEY, Mayor of the City of Chicago,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statutory scheme for electing local school councils created by the Chicago School Reform Act violates the Equal Protection Clause.

2. Whether Illinois law afforded Chicago public school principals a protected property interest in the perpetuation of their statutory tenure that was taken without just compensation in violation of the Takings Clause when the Chicago School Reform Act eliminated tenure for principals.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-11a) is reported at 64 F.3d 1098. The opinion of the United States District Court for the Northern District of Illinois (Pet. App. 12a-49a) is reported at 860 F. Supp. 495.

STATEMENT

In 1988, when the Illinois General Assembly enacted the first Chicago School Reform Act, there was a crisis in the Chicago public school system. See R. 96, ¶ 53.

Experts had called the Chicago public schools among the worst in the country. R. 85-1, Ex. 3. The School Reform Act was intended to reform and improve the Chicago public schools. See 105 ILCS paras. 5/34-1.01 & 1.02 (1994). The General Assembly identified ten specific goals it hoped to achieve through the legislation, including ensuring that students meet or surpass national norms in reading, writing, mathematics, and higher order thinking, and that students attend school regularly and graduate from high school at rates that match or exceed national norms. *Id.* para. 5/34-1.01(A). To achieve these goals, the General Assembly decided to grant greater autonomy to each local school. See *id.* para. 5/34-1.01(B). Accordingly, the 1988 Act created a local school council ("LSC") at each school. Each LSC consisted of six parents of children attending the school, elected by parents of children attending that school; two community representatives residing within the attendance area of that school and who were not parents of children attending the school, elected by residents within the attendance area who also were not parents of children attending the school; two teachers employed at the school, elected by the entire school staff; and the principal of the school. See P.A. 85-1418, § 34-2.1 (1988). Depending on vacancies on the LSC, parents could vote for up to six candidates, but nonparents could vote for at most two candidates. See *ibid.*

The 1988 Act also gave the principal of each school responsibility for supervising the educational operation of the school and for developing a school improvement plan with the assistance of the LSC. P.A. 85-1418, § 24-8.1 (1988). After a school improvement plan is developed and approved by the LSC, the principal is responsible for ensuring its implementation. See *ibid.* In addition, the Act gave the principal a measure of control of the school engineer and the food service staff, who for the first time were held accountable to the school principal. See *ibid.*

Before the 1988 Act, each principal's appointment became "permanent" after a three-year probationary period. See Ill. Rev. Stat. ch. 122, para. 34-84 (1987). A principal with a permanent appointment could be removed only for "cause." *Id.* The 1988 Act changed this by providing that each principal would be employed under a four-year performance contract. See 105 ILCS para. 5/34-8.1 (1994). Under the 1988 Act, principals are selected by the LSCs; each LSC evaluates the performance of the principal and then determines whether the principal's contract should be renewed. See *id.* para. 5/34-2.2. If the principal's contract is not renewed, the LSC may select a new principal to serve under a four-year contract. See *ibid.*

In *Fumarolo v. Chicago Board of Education*, 566 N.E.2d 1283 (Ill. 1990), the Illinois Supreme Court held that the 1988 Act unconstitutionally diluted the votes of community members who do not have children attending the public school by giving them two votes to cast for LSC members, while parents of children attending the public school could cast six votes for LSC members. See *id.* at 1300. The court refused to sever the invalid portions of the Act (*id.* at 1303), but went on to discuss the validity of the Act's elimination of tenure for principals "[b]ecause these issues may arise again should the legislature choose to reenact the legislation in a different form . . . ." *Ibid.* The court concluded that the elimination of "permanent" principals did not impair the obligation of contract or amount to a deprivation of property without due process. See *id.* at 1306-07.

After *Fumarolo*, the Illinois General Assembly enacted "an interim measure to assure stability and to protect the operation of the school system." P.A. 86-1477, § 1 (1991). This interim statute reenacted the provisions of the original Chicago School Reform Act dealing with the appointment of principals and placing them under four-year performance contracts. See *id.* §§ 34-2.3, 34-8.1. It re-established an LSC at each public school consisting of

the principal, and, in addition, two teachers employed at the school, six parents of children currently enrolled at the school, and two community residents, appointed by the Mayor of the City of Chicago. *See id.* § 34-2.1.

In September 1991, the General Assembly enacted a new version of the Chicago School Reform Act to replace permanently the version that had been invalidated in *Fumarolo*. Under the new Act, the elected members of each LSC consist of six parents of children at the school and two residents of the community within the school's attendance area. See P.A. 87-454, § 34-2.1 (1991). All eligible voters within a school's attendance area may vote for any candidate running in the LSC elections, and "[e]ach eligible voter shall be entitled to cast one vote for up to a total of five candidates, irrespective of whether such candidates are parent or community resident candidates." *Ibid.*

The petitioners, Chicago public school principals, filed a 22-count complaint challenging the validity of a variety of provisions of the 1991 Act. Petitioners sued the Chicago Board of Education, the Mayor of the City of Chicago, and the Attorney General of Illinois.[1] The district court certified a "tenure class" defined as all individuals who had earned tenure with the Chicago Board of Education as a teacher or a principal prior to the effective date of the new Act, for the purpose of challenging the provisions of the 1991 Act relating to the tenure rights of principals. The district court also certified a "community resident class" defined as "all individuals who are given the right to vote as community residents in local school council elections and to hold local school

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[1] The petition for certiorari incorrectly identifies the Attorney General as Roland W. Burris. While this case was before the court of appeals, Attorney General Burris was succeeded in office by James E. Ryan, who was therefore automatically substituted as a party by virtue of Fed. R. App. P. 43(c).

council seats," for the purpose of challenging the provisions of the 1991 Act governing LSC elections.

In June 1994, the district court awarded summary judgment against petitioners. The district court concluded that the 1991 Act did not offend one-person, one vote principles since all voters were granted an equal number of votes at LSC elections; the court reasoned that the allocation of six of the eight elected seats to parents was a qualification to serve in public office rather than an infringement on the right to vote, and thus was not subject to strict scrutiny. See Pet. App. 19a-27a. The district court also concluded that the requirement that only parents may serve in six of the seats advanced the state's interest in ensuring that members of LSCs would be knowledgeable, as well as directly interested in and highly motivated to address the problems of local schools; hence this requirement comported with equal protection. See Pet. App. 27a-29a. The district court also held that Illinois law had granted principals no vested right to retain tenure even if legislative judgments about the desirability of maintaining tenure were to change. See Pet. App. 36a-44a. And for this reason, the district court further held that the 1991 Act did not amount to a taking of principals' property rights for a public purpose without the payment of just compensation in violation of the Takings Clause. See Pet. App. 46a-47a.

In September 1995, the court of appeals affirmed the judgment of the district court, although on a different ground. The court of appeals held that one-person, one-vote principles do not apply to LSCs under the Chicago School Reform Act, since LSCs have neither the power to tax nor the power to set systemwide budgets or policies. Hence LSCs are "special-purpose governmental bodies" to which the requirement of one-person, one-vote does not apply. See Pet. App. 5a-8a. For this reason, reserving six seats for parents should be upheld unless it were irrational, and the court concluded that this new experiment on local school governance could not be

branded as irrational. See Pet. App. 8a. The court of appeals disagreed with the district court's conclusion that the allocation of six seats to parents did not affect the right to cast a vote of equal weight to all others. In the court of appeals' view, "the school law brings about a substantial dilution in the voting power of one class of voters, the nonparent residents." Pet. App. 4a. The court of appeals did embrace the district court's conclusion that principals had no vested right in the continuance of the tenure system that predated the School Reform Act, and accordingly rejected petitioners' Takings Clause claim because petitioners had no constitutionally protected property interest in the maintenance of their tenure rights. See Pet. App. 9a-11a.

ARGUMENT

Petitioners seek plenary review of an aspect of Illinois law that, as far as the parties are aware, is unlike any other in the country. In response to a crisis in the Chicago public schools, the General Assembly adopted legislation vesting certain responsibilities in local school councils. The law, as amended in 1991, reserves six of the eight elected seats on the LSCs for parents and further provides that principals should have no permanent tenure.

Petitioners claim that the allocation of six seats to parents violates the Equal Protection Clause because it dilutes the votes of nonparents. Petitioners rely on an asserted conflict between the holding of the court of appeals that LSCs under the 1991 Act are special-purpose governmental bodies and the conclusion of the Illinois Supreme Court in *Fumarolo* that LSCs functioning under the 1988 version of the Act exercised general governmental powers. But the conflict between the opinion below and *Fumarolo* is of little practical or legal significance and need not be resolved by this Court. In fact, it is far from clear that the state and federal courts have a different view on the constitutionality of the 1991 Act.

Moreover, because there are alternate grounds available on which the judgment below can be affirmed, even if the Court granted plenary review, it might conclude that it need not reach the voting rights questions that petitioners present.

Petitioners also claim that legislative alteration of their tenure rights amounts to a taking of their property for a public purpose without the payment of just compensation. But even *Fumarolo*, on which petitioners rely so heavily for their first claim, rejects petitioners' understanding of their tenure rights, holding that public school principals never had under Illinois law the kind of vested expectation in the continuance of tenure that could amount to a property interest protected against subsequent legislative alteration. The Chicago School Reform Act therefore does not run afoul of the Takings Clause.

Most important, on both issues petitioners press, the court of appeals decided narrow and fact-bound questions; and its analysis on both points—of the scope of LCSs' powers and principals' tenure rights under Illinois law—hardly warrants this Court's review. Accordingly, the petition should be denied.

1. The court of appeals concluded that the provisions of the 1991 Chicago School Reform Act governing the election of LSC members do not violate the Equal Protection Clause because LSCs are special purpose governmental bodies to which the constitutional rule of one-person, one-vote does not apply. Petitioners do not quarrel with the test the court below used to determine what constitutes a special purpose body, and it has long been clear that governmental bodies exercising limited powers of primary concern only to a discrete class need not conduct elections under one-person, one-vote principles, but instead may limit the franchise to the class primarily interested in their activities. See *Ball v. James*, 451 U.S. 355 (1981); *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973)

(per curiam); *Salyer Water Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). Petitioners claim only that the court of appeals misapplied this test when analyzing the particular powers granted LSCs by the Act. See Pet. 13-15. As the court of appeals observed, however, LSCs have no power to tax, or to decide how much will be spent at particular schools, nor do they have the power to set district-wide educational policies. Their decision-making powers are limited to matters affecting their own schools—determining how to implement district-wide policies and how a limited pool of discretionary funds will be spent at that school. See Pet. App. 7a-8a. Aside from *Fumarolo*, petitioners identify no decision of any court in which a governmental body with even remotely similar powers was held to be subject to one-person, one-vote principles. Instead, petitioners' exclusive basis for seeking certiorari is the conflict they assert exists between the opinion of the court of appeals and *Fumarolo*. That conflict, however, is more apparent than real, and has little practical or legal significance.

a. The conflict petitioners press has no practical significance because there is no risk of inconsistent results between the state and federal courts on the validity of the 1991 Act. The federal courts have upheld the law, and litigation over school reform now comes to an end in Chicago. Because of the preclusive effect of the decision below, there is no risk that the state and federal courts will reach inconsistent results on the validity of the 1991 Act. State courts must give res judicata effect to the decisions of the federal courts. See *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938); *Ellens v. Chicago Area Office Federal Credit Union*, 576 N.E.2d 263, 265-66 (Ill. App. 1991). Here, the certified classes in this case include all Chicago voters and public school principals. Thus, any potential plaintiff who seeks to attack this system in the Illinois courts will confront res judicata, which prevents parties to a prior suit from relitigating the same

cause of action. See, *e.g.*, *People ex rel. Burris v. Progressive Land Developers*, 602 N.E.2d 820, 824-25 (Ill. 1992). And this result is hardly unfair to petitioners —had they wished to press their voting rights claims before courts bound by stare decisis to adhere to *Fumarolo*, they could have sued in the Illinois courts. Petitioners thus should not be heard to complain that the court of appeals did not consider itself bound by *Fumarolo*. Because the court of appeals has authoritatively decided the validity of school reform, its decision, if left unreviewed, creates no legal uncertainty or risk of inconsistent results between the state and federal courts.

b. The conflict petitioners press has little legal significance as well. The decision below and *Fumarolo* employ the same legal principles; they differ only on the narrow and fact-bound question whether LSCs under the Chicago School Reform Act exercise sufficiently general governmental powers to fall within the one-person, one-vote rule. And on that point, petitioners have identified no other school system anywhere in the country with a LSC structure similar to the one in Chicago. Thus the resolution of the fact-bound dispute between the court of appeals and the *Fumarolo* court is unlikely to have much if any legal significance. What is more, the significance of whatever disagreement there may be between the Seventh Circuit and the Illinois Supreme Court has been further eroded by 1995 amendments to the School Reform Act that have altered LSCs' powers by increasing the powers of the Board and its General Superintendent over LSCs. See P.A. 89-15, § 5 (1995). Thus the *Fumarolo* decision likely has limited applicability to the current version of the statute.

c. Finally, the conflict between the decision below and *Fumarolo* is more apparent than real. In fact, it is far from clear that the Illinois Supreme Court would have invalidated the 1991 Act even if, as petitioners claim, its view of the constitutional significance of the powers exer-

cised by LSC's differs from that of the Seventh Circuit. That is because the Illinois Supreme Court might well agree with the district court's view in this case that the 1991 Act did not infringe the right to vote, even for members of a general purpose government body, because the Act creates only a qualification to hold a public office that is not subject to strict scrutiny under the Equal Protection Clause.

Unlike the legislation invalidated in *Fumarolo*, which permitted community residents to vote for and elect only two of their number to LSCs while parents could vote for and elect six of their number to the six parental seats on each LSC, the 1991 Act grants all voters five votes that they may cast however they like. It is thus hard to see any way in which this legislation infringes the right to vote or the rule of one-person, one-vote, since each voter is given an identical number of votes to cast as he wishes. The 1991 Act also permits any community resident to run for office. At most, this legislation affects only the right to run for public office by making fewer seats available to community residents, but the right to run for or serve in public office is not considered a fundamental right triggering strict scrutiny under the Equal Protection Clause. See *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Bullock v. Carter*, 405 U.S. 134, 143 (1972). "[T]he mere fact that a state's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not itself compel close scrutiny.'" *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (quoting *Bullock*, 405 U.S. at 143). In *Clements v. Fashing*, the Court explained that only two types of restrictions on candidates' ability to gain election to public office are subject to strict scrutiny: those that create restrictions based on wealth, and those that impose burdens on new or small parties or on independent candidates. See 457 U.S. at 966. See also, *e.g.*, *Norman v. Reed*, 502 U.S. 279 (1992); *Illinois State Board of Elections v. Socialist*

Workers Party, 440 U.S. 173 (1979); *Lubin v. Panish*, 415 U.S. 709 (1974).

The Chicago School Reform Act of 1991 accordingly does not trigger strict scrutiny. It plainly does not restrict candidates' access to the ballot on the basis of economic status, political affiliation, or any other suspect basis: there is not a hint of an economic criterion, and candidates for seats on LSCs may place their names on the ballot regardless of their political affiliation. Candidates —whether they are parents of children attending the school or community residents—may come from any point on the political spectrum and need not be associated with any political party. It was such reasoning that led the district court to conclude that the 1991 Act is not subject to strict scrutiny. See Pet. App. at 21a-27a. And the district court's reasoning supplies a basis to affirm the judgment below without reaching the voting rights questions that petitioners present.

The court of appeals rejected the district court's approach for two reasons. First, it correctly rejected the idea that "limitations on candidacy cannot infringe the right to vote." Pet. App. 4a. Of course, we agree; but that does not mean that all limitations on candidacy infringe the right to vote. Here, as we explain, the 1991 Act includes no restriction of the type subject to strict scrutiny. Moreover, we agree that the example the court of appeals used to prove its point—that a statute "designed so as to permit only one actual candidate" (*ibid.*) —would be invalid, although not for the reason that the court gave. The court thought the problem was that such a restriction would deprive the electorate of "actual voting power." *Ibid.* But we are aware of no federal right to "actual voting power"; in fact state and local legislatures have plenary power as a matter of federal constitutional law to make any position appointive. *E.g.*, *Fortson v. Norris*, 385 U.S. 231, 233-34 (1966). Rather, the scheme described by the court of appeals would be unconstitutional—without regard to strict scrutiny—because

it would be an irrational restriction on the ability to run for public office. See generally *Quinn v. Millsap*, 491 U.S. 95, 106-09 (1989) (requirement that members of board drafting charter for local government be landowners is irrational); *Turner v. Fouche*, 396 U.S. 346, 362-64 (1970) (requirement that school board members be landowners is irrational). After all, there is no point in holding an election if the legislature has already picked the winner.

Second, the court of appeals concluded that even granting all voters an equal vote—as the 1991 Act does—will not comport with one-person, one-vote principles if successful candidates "cannot be trusted to be perfect agents" of some of the voters. Pet. App. 4a. The court then announced that it would "assume realistically that parents who have children in a school are not adequate representatives . . . of persons who do not." *Ibid.* Thus, since six of the eight elected LSC members must be parents, the 1991 Act, in the court of appeals' view, "brings about a substantial dilution in the voting power of" nonparents because they cannot be adequately represented by the six parental LSC members. *Ibid.* We know of no authority for the Seventh Circuit's expansion of one person-one vote principles through this "perfect agent" theory of representation. Moreover, the court's assumption that parents will not represent the views of the nonparents in the electorate is unsupported by any finding of the district court or evidence in the record, and we do not believe that a federal court has greater capacity to analyze the qualifications of parents to represent all of their constituents than does the legislature.

What is more, the assumption of the court of appeals is contrary to the appropriate presumption in voting rights cases set forth by this Court. The Court has explained that elected representatives—even though they may not share every characteristic of all of the voters—are presumed to serve vigilantly the interests of all who elect them. See *Dallas County v. Reese*, 421 U.S. 477,

479-80 (1975); *Dusch v. Davis*, 387 U.S. 112, 115 (1967); *Fortson v. Dorsey*, 379 U.S. 433, 438 (1965). The Court has never precluded a requirement that elected representatives have greater qualifications for office than those possessed by all their constituents—if that were so, requiring elected prosecutors to be lawyers, for example, would presumably disenfranchise voters who are not attorneys. To the contrary, the Court has recognized the "basic teaching that elected officials represent all of those who elect them." *Dallas County*, 421 U.S. at 480. There is no reason to reject that teaching here. It seems clear that parent members of LSCs must at least attempt to represent the interests of community residents, or these voters can vote the parent members out of office at the next election. Surely it is realistic to assume that community residents can and do vote for parents of children attending the school who share their views on the issues that affect the particular school or their views on education in general.

When a candidate qualification is not based on a suspect criterion, it should be evaluated only to determine whether it "bear[s] some rational relationship to a legitimate state end." *Clements v. Fashing*, 457 U.S. at 963.[2] Thus, the allocation of six seats on each LSC to parents of children attending the school need only have a rational basis. And as the district court concluded, the 1991 Act surely bears a quite direct relationship to a legitimate state end. See Pet. App. 27a-29a. Improving the quality of education, previously in crisis, in a public school system in the largest city of Illinois is surely a

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[2] The district court thought that *Anderson v. Celebrezze*, 460 U.S. 780 (1983), obligated it to apply a form of intermediate scrutiny to the 1991 Act. See Pet. App. at 24a-25a. But in *Anderson*, the statute at issue imposed restrictions on access to the ballot on the basis of partisan affiliation, and a form of heightened scrutiny was appropriate for that reason. See 460 U.S. at 787-88. The same is not true here.

legitimate state goal. And involving parents in LSCs is rationally related to furthering that goal.

Studies have shown that increased parental involvement in a school improves the level of education at the school. See R. 85-2, Exs. 5-8. Parents bring to the LSC special knowledge of the problems and needs of the school. Their knowledge and motivation enhances the ability of the LSC to do its job. The General Assembly rationally concluded that parent members of the LSC would likely be more knowledgeable and involved, and for that reason could provide more effective community input. This does not mean that parents are pursuing some special or self-interested agenda contrary to the interest of non-parent voters. Indeed, there is every reason to assume that both parents and community residents share a common interest in improving the quality of local schools consistent with district-wide budgeting and policies. This legislation is instead based on the recognition that parents' knowledge and motivation is particularly valuable in making the LSC an effective voice for each local community.

Just as the district court embraced the view that the 1991 Act did not trigger strict scrutiny and should be sustained as rational, the Illinois Supreme Court may well have upheld the 1991 Act on the same grounds as the district court had petitioners brought this case in state court. Thus, it is far from clear that the state and federal courts have a different view on the ultimate constitutionality of the 1991 Act. Moreover, because of the possibility that the judgment below can be affirmed on the alternate ground embraced by the district court, even if this Court granted plenary review, it might ultimately conclude that it need not reach the questions presented by petitioners.

d. In sum, then, the disagreement between the Illinois Supreme Court and the Seventh Circuit on the significance of LSCs' powers that petitioners claim exists is little

reason for this Court's review of the decision below.[3] The constitutional standards employed by both courts were the same, and their fact-bound application of a settled test to a unique set of powers granted LSCs in Chicago does not present a recurring question of nationwide significance. Indeed it is not even clear that the state and federal courts have a different view on the ultimate question whether the 1991 Act is constitutional. Nor is there any risk that the state and federal courts will reach inconsistent results on the validity of the Act, given the preclusive effect that the judgment below will have in subsequent litigation. And the existence of an alternate ground to affirm the judgment below means that the issues now pressed by petitioners may not prove dispositive even if the Court grants review in this case. For all these reasons, further review by this Court is unwarranted.

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[3] Petitioners also claim that the Seventh Circuit should have followed *Fumarolo* when deciding their voting rights claims brought under the Illinois Constitution. See Pet. 22. In their merits brief in the court of appeals, however, petitioners confined their state constitutional voting claims to a footnote, and although the court of appeals did not expressly say so, it likely considered the state constitutional claims waived given their cursory treatment. The Seventh Circuit has consistently held that arguments confined to a footnote or otherwise treated in a cursory fashion are waived. See, *e.g.*, *Tyler v. Runyon*, 70 F.3d 458, 464 (7th Cir. 1995); *Bakalis v. Golembeski*, 35 F.3d 318, 326 n.8 (7th Cir. 1994); *Casteel v. Pieschek*, 3 F.3d 1050, 1051 n.2 (7th Cir. 1993); *Dresser Industries, Inc. v. Gradall Co.*, 965 F.2d 1442, 1448 (7th Cir. 1992); *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989), cert. denied, 494 U.S. 1027 (1990); *Anderson v. Gutschenritter*, 836 F.2d 346, 349-50 (7th Cir. 1988); *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984). Moreover, as we explain above, it is far from clear that the Illinois Supreme Court would have disagreed with the district court's analysis of petitioners' voting rights claims even assuming that it would have reached a different conclusion than the Seventh Circuit on state constitutional grounds when analyzing whether LSCs were special-purpose governmental bodies. Thus any implicit disagreement between the Seventh Circuit and the Illinois Supreme Court on state constitutional grounds does not merit this Court's intervention.

2. Petitioners also claim that the legislative modification of their tenure rights amounts to a taking of their property in violation of the Takings Clause. Petitioners, however, do not quarrel with the holding of the courts below—as well as the holding of the Illinois Supreme Court in *Fumarolo*—that Illinois law never granted public school teachers or principals any vested expectation that the legislature would never modify or abrogate statutory tenure rights. In fact, petitioners do not seek review of the holding below that their Due Process and Contract Clause theories lack merit precisely because Illinois law did not grant them any vested expectation that statutory tenure rights would remain inviolate. See Pet. App. 9a-10a. And because Illinois law never granted petitioners any vested expectation that the legislature would preserve their statutory tenure rights in perpetuity, petitioners' theory that the legislature's decision to modify tenure rights amounts to a taking of a constitutionally protected property interest is incorrect.

When individuals are deprived of rights to which they are securely entitled under state law, there is little question but that they are deprived of "property" within the meaning of the Due Process Clause; thus a government employee is deprived of a constitutionally protected property interest for due process purposes when he is fired without cause from a position to which statutorily granted tenure has attached. See, *e.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). There is, however, generally no vested expectation that the legislature will not alter the statutory entitlement itself, and for this reason, such an alteration deprives a public employee of no vested rights and does not amount to a "taking" of "property."

"A 'legitimate claim of entitlement' to a government benefit does not transform the benefit itself into a vested right. Rather, due process 'property interests' in public benefits are 'limited,' as a general rule, by the governmental power to remove, through prescribed procedures,

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the underlying source of those benefits.'" *Kizas v. Webster*, 707 F.2d 524, 539 (D.C. Cir. 1983) (emphasis deleted) (quoting *O'Bannion v. Town Court Nursing Center*, 447 U.S. 773, 796, 798 (1980) (Blackmun, J., concurring)), cert. denied, 464 U.S. 1042 (1984). Accord, *e.g., In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 988 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988). While there is a deprivation of property every time a tenured teacher is terminated, there is no taking every time the statutory entitlement creating the vested expectation giving rise to property rights is legislatively altered. To the contrary, it has long been settled that there is a presumption that tenure rights can be "altered at the will of the legislature." *Dodge v. Board of Education*, 302 U.S. 74, 78-79 (1937). In *Fumarolo*, on which petitioners are otherwise content to rely, the Illinois Supreme Court expressly held that the Illinois School Code created no vested expectation that the legislature would never abolish tenure rights. See 566 N.E.2d at 1305-07. Thus the Chicago School Reform Act may have deprived principals of their tenure, but it did not take from them any vested right or expectation.

As the court of appeals correctly recognized (see Pet. App. at 10a-11a), this principle dooms petitioners' takings claim. Chicago public school principals had a legitimate claim of entitlement to continued employment during good behavior and efficient service under the former Illinois School Code (see *Fumarolo*, 566 N.E.2d at 1306), but no vested right to prevent the General Assembly from changing the provisions of the School Code (see *id.* at 1305-07). Because petitioners had no right to expect that statutory tenure would not be modified by subsequent legislation, the Illinois General Assembly's decision to modify it took nothing from petitioners that was securely theirs in the first place.

Both this Court and other circuit courts, in a wide variety of contexts, have analyzed takings challenges to

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legislative changes affecting benefits and other procedural rights consistent with the approach of the court of appeals in this case. See, *e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 606-09 (1987) (change in AFDC rules held not to be a taking); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986) (change in pension regulation held not a taking); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (reduction in social security benefits held not a taking); *Hoffman v. City of Warwick*, 909 F.2d 608, 616 (1st Cir. 1990) (repeal of state statute providing seniority credits to veterans held not a taking); *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d at 988-89 (federal law establishing Federal Tort Claims Act as exclusive remedy for injuries caused by atmospheric nuclear weapons testing even for cases already pending in state court held not a taking); *Kizas*, 707 F.2d at 539 (modification of special preference FBI gave to its clerical and support personnel who sought employment as FBI agents held not a taking).

Petitioners primarily rely on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), which petitioners claim adopted a due process analysis for takings cases because of the quotation from *Board of Regents v. Roth*, 408 U.S. 564 (1972). In *Ruckelshaus*, the court discussed whether a trade secret could constitute property protected by the Takings Clause and wrote:

> In answering the question now, we are mindful of the basic axiom that " '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' "

467 U.S. at 1001 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), in turn quoting *Board of Regents v. Roth*, 408 U.S. at 577). But this reiterates only the general proposition with which the court of appeals had no quarrel—to assert a property

interest under either the Due Process or the Takings Clause, a plaintiff must identify some legitimate claim of entitlement from an independent source such as state law. The only other case petitioners cite on this point, *Calvert Investments, Inc. v. Metropolitan Sewer District*, 847 F.2d 304, 307 (6th Cir. 1988), also says no more than this.

Thus, to prevail on their takings claim, petitioners must identify some legitimate claim of entitlement under state law to prevent any legislative modification of their tenure rights. This, of course, they cannot do. As the courts below and the Illinois Supreme Court in *Fumarolo* concluded, Illinois law never granted petitioners any claim of entitlement to prevent the Illinois General Assembly from modifying or even abolishing statutory tenure rights. Without any such entitlement, petitioners were accordingly not deprived of the type of vested interest that amounts to constitutionally protected property when the Illinois General Assembly decided to abolish tenure rights as it was entitled to do. The *Roth* test, on which petitioners rely, simply does not help them.

Precisely because statutorily granted property interests seldom include an assurance that a legislature will not modify the statutory entitlements it creates, it should come as no surprise that the court below found the ambit of protection afforded to those who seek to challenge legislative modification of such entitlements is considerably narrower than the protection afforded to plaintiffs who hold other, less conditional forms of property. This distinction, for example, explains the result in *Ruckelshaus*, in which the Court addressed trade secrets, and concluded that they were entitled to the same form of constitutional protection as tangible property, since they "have many of the characteristics of more tangible forms of property." 467 U.S. at 1002. Petitioners identify no case in which statutorily created entitlements that are granted conditionally—that is, only unless or until the legislature modifies or repeals them—could not be altered

without the payment of compensation under the Takings Clause.[4] In short, the decision below is consistent with all others of which we are aware that address statutory entitlements such as tenure, and is fully consistent with this Court's approach to such takings claims. There is accordingly no justification for further review of the eminently correct decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[4] Indeed, *Calvert Investments*, the only other case petitioners cite on this point, found no taking when a municipality decided not to contract with Calvert for sewer service where state law granted Calvert no vested expectation that it could obtain such a contract. See 847 F.2d at 307-10.

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